Supreme Court, U.S.
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No. 04-313

In The Supreme Court of the United States

PORTLAND PUBLIC SCHOOLS,
SUSAN WINTHROP, and ROBERT CREBO,

Petitioners,

v.

PAMELLA E. SETTLEGOODE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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In response to the petition for certiorari, Pamella Settlegoode does not contest the fact that she failed to challenge the district court's order granting a new trial. Nor does she address the impact of *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), on her failure to challenge the new trial order. Instead, Settlegoode speculates that the Ninth Circuit must have concluded that (1) her brief, when read as a whole, adequately challenged the new trial ruling, or (2) the district court committed plain error in awarding a new trial. Neither of these suppositions is true.

The Ninth Circuit did not determine that Settlegoode adequately challenged the district court's order granting a new trial. Indeed, neither Settlegoode's brief nor the Ninth Circuit's original opinion even mentioned, let alone analyzed, the order granting a new trial. Only after Portland Public Schools filed its petition for rehearing did the Ninth Circuit address the order granting a new trial, and the court's amended opinion did not find – and could not reasonably have found – that Settlegoode challenged the new trial order on appeal.

Likewise, the Ninth Circuit did not purport to apply the plain error doctrine to the district court's order granting a new trial. The court's original and amended opinions make no mention of the term "plain error," nor do they discuss any exception to the uniform rule that appellate courts review only those rulings challenged on appeal.

Moreover, had the Ninth Circuit applied the plain error doctrine to the order granting a new trial, it would have been inappropriate to do so. This Court has described the plain error doctrine as follows: "'In exceptional circumstances,

especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Silber v. United States*, 370 U.S. 717, 718 (1962) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). Given the wide latitude afforded to district courts in deciding a motion for a new trial – including the ability to assess witness credibility and to weigh the evidence – the Ninth Circuit could not properly have concluded that the grant of a new trial was plain error. If the plain error doctrine allowed the Ninth Circuit to reverse the unchallenged order granting a new trial, the doctrine would swallow the settled rule that appellate review is confined only to those rulings challenged on appeal.

The Court's decision in *El Paso*, as well as the law of every circuit, prohibits appellate courts from reviewing rulings not challenged on appeal. Because Settlegoode did not challenge the district court's order granting a new trial on appeal, the Ninth Circuit erred when it addressed and reversed that order. Accordingly, the Court should vacate the Ninth Circuit's amended opinion and remand the case to the district court for a new trial on all claims.

Respectfully submitted,

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